BRIEF IN OPPOSITION TO THE PETITION FILED IN THIS CAUSE FOR A WRIT OF CERTIORARI.

The petition before the Court for writ of certiorari is complaining on the proposition that the Circuit Court of Appeals reversed the District Court, and therefore set aside the findings of fact made in the cause by the District Court on its hearing there.

The first finding of fact of the District Court was that the price paid by Dr. J. P. Dyar for the property purchased by him from the trustee in bankruptcy was grossly inadequate at the time of the purchase. No fraud was charged to Dr. Dyar. No fraud was committed by Dr. Dyar. No fraud was charged to the trustee, Marvin Kelley. No fraud was committed by Marvin Kelley in this sale. Marvin Kelley in the sale of this property to J. P. Dyar acted as the agent and representative of the creditors of said bankrupt estate, including the petitioner, J. F. Stewart. The trustee dealt at arm's length with this respondent, and made sale of this land at the bottom of the depression and after he had an order of the bankruptcy court authorizing private sale for two years. This was the first and only offer he ever had, and the only one he could get.

In the case of *Barrett & Co. v. Pollak Co., et al.*, 108 Ala. 390 (page 398) we find the following:

> "But, it is the rule in this State, that the secret fraudulent intent of the assignor in making a general assignment for creditors, unknown to the assignee at the time they accept trust, and to the creditors, does not authorize one of the creditors to set aside the assignment for fraud. Truss v. Davidson, 90 Ala. 359.

> This is the way we understand the averments of the bill."

In *27 Corpus Juris, page 484, Section 135,* we find the following:

> "Although gross inadequacy of consideration when combined with other circumstances may amount to proof of actual fraud, mere inadequacy of price, unattended by other circumstances giving color and form to the transaction, is not usually sufficient to establish fraud and invalidate the conveyance."

In the case of *Taylor v. Salt Creek Consol. Oil Co.,* 285 Fed. 532, on page 537, quoting from *Jackson v. Jackson,* we find the following:

> "Every case depends on its own circumstances in determining the lapse of time essential to make applicable the doctrine of laches. It will be applied in cases where only a short period of time has elapsed, where the conditions surrounding the property in controversy have changed, especialy those relating to its value, and affecting injuriously the interests of innocent defendants."

In the case of *Isaac Kempner v. Chas. B. Churchill, et al.,* 8 Wall. 362, 19 L. Ed. 461, it is said:

> "It is true that mere inadequacy of consideration, unless extremely gross, does not per se prove fraud."

In the case of *Meservey v. Robey,* 198 Fed. 844, at page 847, we find the following:

> "There is hardly any question upon which there may be a wider range of opinion than upon the actual value of property in a town or small city."

and on page 848 of the same case:

> "To avoid this transfer under Section 67e of the Bankruptcy Act, it is incumbent upon the complainant to show actual fraud in fact in the conveyance of the property to the deceased, as distinguished from constructive fraud,"

The findings of fact, numbered Two and Three, of the District Court were based on error, as shown by the evidence and the law controlling same in this cause, and the Circuit Court of Appeals properly set the same aside.

(a) J. F. Stewart's attorney, John R. Sample, filed his claim in the Bankruptcy Court for him.

(b) The claim of J. F. Stewart was filed in the Bankruptcy Court.

(c) J. F. Stewart actually signed the acknowledgment notice and consent for the Court to authorize the trustee to sell the land.

(d) J. F. Stewart had constructive notice of the sale of the lands to Dr. J. P. Dyar, when Dyar's deed to the lands was filed for record on September 17th, 1932.

Code of Alabama, 1923, Section 6854 (1).
Code of Alabama, 1940, Title 47, Section 95.
Code of Alabama, 1940, Title 47, Section 102.
Ivy v. Hood, 202 Ala. 121, 79 So. 587.
Veitch v. Woodward Iron Co., 200 Ala. 358, 76 So. 124.
Gill v. Moore, 200 Ala. 511, 76 So. 453.
Gamble v. Black Warrior Coal Co., 172 Ala. 669, 55 So. 190.

Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 207.
Peters Mineral Land Co. v. Hooper, 94 So. 606.
Washington v. Young, 224 Ala. 232, 139 So. 92.
Chapman v. Johnson, 142 Ala. 633, 38 So. 797.
Newberry v. Wilkinson, 199 Fed. 673.

The District Court erred in its decree by holding in effect, that notice was necessary to be given to J. F. Stewart of the proposed sale or the sale of said property.

In re Weeks, 4 Fed. Suppl. 558.
Wiswall v. Campbell, 93 U. S. 347, 23 L. Ed. 923.
8 C. J. S. 978, Section 270.
8 C. J. S. 1047, Section 316 (b).
7 C. J. 235, Sec. 370.
7 C. J. 235, Sec. 369.
In re Knox Auto. Co., 210 Fed. 569.
In re Hawkins, 125 Fed. 363.
In re Edes, 135 Fed. 595.

The District Court erred in its decree appealed from because of laches, in this: the petitioner, J. F. Stewart, as a creditor, filed his proof of claim in the bankruptcy proceeding of W. F. Livingston, bankrupt, thereby becoming a party to the proceeding and chargeable with notice of what the file in said bankruptcy case might reveal, and stood mute for eight years.

In re Verdon Cigar Company, 193 Fed. 813.
In re Octave Mining Company, 212 Fed. 457.
Newberry v. Wilkinson, 199 Fed. 673.
Dunn v. Ponceler, 178 So. 40.
21 C. J. 10.
Alabama Code 1923, Sec. 4852.
Peters Mineral Co. v. Hooper, 94 So. 30.
Gayle v. Pennington, 185 Ala. 53, 64 So. 572.

Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73.
Herren v. Beck, 231 Ala. 328, 164 So. 904.
Pierce-Smith Converter Co. v. United Verde Copper Co., 293 Fed. 108.
Courson v. Tollerson, 147 So. 635.
In re Nichols, 166 Fed. 603.
Johnson B. Ellison & Son v. Weintrob, 272 Fed. 466.
Brooks v. Greil Bros. & Co., 179 Ala. 469.
General Electric Co. v. Yost Elec. Co., 208 Fed. 709.
Mosler v. Lurie, 200 Fed. 453.
Woodmance v. Hewitt Mfg. Co., 68 Fed. 489.
Nash v. Ingalls, 101 Fed. 645.
Taylor v. Salt Creek, etc., Co., 285 Fed. 532.
Jackson v. Jackson, 175 Fed. 710.
In re Grant, 143 Fed. 661.
Brooks v. Griel Bros., 179 Ala. 469.
7 Corpus Juris, 243, Sec. 374.
In re Haywood Wagon Company, 219 Fed. 655.
Foster v. Railroad Co., 146 U. S. 88, 13 Sup. Ct. 28, 26 L. Ed. 899.

The Circuit Court of Appeals rightly held the deed to Dr. Dyar valid when there were no allegations of fraud or facts alleged implicating Dr. Dyar in any fraud or suspicion of fraud.

We respectfully insist that the District Court rendered an erroneous decree on the finding of facts, which, if true, would not authorize the decree rendered, and the Circuit Court of Appeals properly reversed the decree of the District Court.

Barrett v. Pollak, 108 Ala. 390, 18 So. 615.
Beall v. Lehmann Derr, 110 Ala. 446, 18 So. 230.
Jordan v. Collins, 107 Ala. 572, 18 So. 137.

Rice-Stix & Co., et al. v. Less, et al., 105 Ala. 298, 6 So. 917.
Smith v. Teague, 119 Ala. 385, 24 So. 4.
Taylor v. Salt Creek Consol. Oil Co., 285 Fed. 532.
Jackson v. Jackson, 175 Fed. 710.
27 C. J. 484, Sec. 135.
Kempner v. Churchill, 8 Wall. 362, 19 L. Ed. 461.
Meservey v. Roby, 198 Fed. 844.

In the case *In re Weeks*, 4 Fed. Suppl. 558, it is said:

> "D. C. Tex. Lien creditor who has not filed claim or otherwise submitted to bankruptcy court's jurisdiction is entitled to notice before land may be sold free of his lien. (Bankr. Act 58a (4), 11 USCA 94 (a) 4.)"

In the case of *Wisswell v. Campbell*, 93 U. S. 347, 23 L. Ed. 923, the court said:

> "Every person submitting himself to the jurisdiction of the Bankruptcy Court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences. His remedies for the purpose of this proof are prescribed by law."

8 Corpus Juris, Secundum, 978, Section 270, is in part as follows:

> "* * * and, under the general statutory power cited, the referee may authorize the trustee to obtain funds for the preservation of the bankrupt estate or direct

> the trustee for good cause to sell the property of the bankrupt at private sale with or without notice."

and, under the general statutory powers cited, the referee may authorize to obtain funds for the preservation of the bankrupt estate, or direct the trustee, for good cause, to sell the real property of the bankrupt at private sale, with or without notice.

Following this Section, and cited thereunder, is the case of *In re Knox Automobile Company*, 210 Federal 569. This opinion is in part as follows:

> "This is a petition to review an order of the referee authorizing the trustee in bankruptcy to sell all the property of the bankrupt at private sale without notice to the creditors or prior approval of the court. The order also authorizes the trustee to sell at public auction, but to that part of it no objection is made. The property has been appraised at $1,682,000. The total indebtedness is about $1,265,000.
>
> "The order is objected to upon the grounds: (1) That it leaves too much to the discretion of the trustee, and (2) that it authorizes the sale of all of the property and estate of the bankrupt, which it is said cannot be done under general Order XVIII.
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> "As to (1):
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> " 'The discretionary power of the referee directing a private sale of a bankrupt estate ought not to be disturbed unless it clearly appears to have been improvidently exercised.' Re Hawkins (D. C.) 125 Fed. 633."

Also cited in the footnote in 8 *C. J. Secundum*, in the case *In re Hawkins,* 125 Fed. 633. This is a very short opinion, and we quote the whole of it:

> "The Supreme Court, by general order No. 18, subd. 2 (18 Sup. Ct. vi), must be regarded as giving a construction to the bankrupt act authorizing a court, including the referee, to direct a private sale, with or without notice, for good and sufficient cause shown. District rule 14 carries out this view. On May 28, 1903, an application was made by the trustee to the referee for leave to sell the property of the bankrupt at private sale. The referee becoming satisfied that the bankrupt estate, on account of the reason set forth in the application, would be benefited by private sale, directed such sale without notice to creditors, and pursuant thereof certain property of the bankrupt has been sold and delivered, and the purchase price fully paid. The sale of other property consisting of lands in a Western State, has been agreed upon, the terms being satisfactory to the trustee, who is ready to deliver the deed upon receiving the purchase price. The discretionary power of the trustee directing a private sale of a bankrupt estate ought not to be disturbed, unless it clearly appears to have been improvidently exercised. The facts appearing by the moving papers do not disclose an abuse of discretion or lack of good faith by the trustee or the appraisers or any one acting in behalf of the bankrupt estate. In the absence of such a showing the judgment of the referee that 'the trustee has done remarkably well as regards both the personal property and real estate in realizing a sum therefor equal to the appraiser's valuation', will be accepted by this court as final.
>
> "Motion denied."

To the same effect is the case of *In re Edes,* 135 Fed. 595. In *7 Corpus Juris, 235, Section 369,* it is said:

> "In the case of a private sale it is not essential that notice should be directed."

Section 370 on the same page is in part as follows:

> "It is not essential to the validity of a sale that it should be at auction, but the court or referee may, for good cause shown, order either real or personal property to be sold at private sale, with or without notice."

It will be seen from these cases that the referee has the same authority to order a private sale, with or without notice, and that it is not necessary that notice be given of the private sale.

In the case of *In Re Verdon Cigar Co.,* 193 Fed. 813, the last paragraph of the opinion is as follows:

> "Therefore, because of his prolonged and unreasonable inactivity and lack of diligence, petitioner is not entitled to the relief for which he prays, and his petition must be dismissed. This conclusion is supported by numerous authorities." (Authorities cited.)

We are not quoting the whole opinion, but it is all interesting and instructive, and along the same lines.

We respectfully call the Court's attention to the case of *In re Octave Mining Company,* 212 Fed. 457. We direct the court's attention to the whole opinion on the question

of laches, but we are only quoting a short part of the same, which is as follows:

> "What is a reasonable time in which a matter has been usually fixed by standing order in the various courts, running from 10 days to 30 days, and the question of what is a reasonable time in the absence of a stated rule has been considered in several cases, among others in the following: * * *"

We also call the court's attention to the case of *Newberry v. Wilkinson, et al.*, 199 Fed. 673. From page 686 of this opinion we quote the following:

> "In a general sense, laches is defined as: 'A neglect to do what in the law should have been done for unreasonable or unexplained length of time under circumstances permitting diligence.' 24 Cyc. 840."

We quote further from the same case (page 688), as follows:

> "Again, says the court, in Nash v. Ingalls, 101 Fed. 645, 648, 41 C. C. A. 545, 548:
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> " 'The law required that, in order to relieve himself from the consequence of delay in seeking the remedy for a wrong, the party should have given reasonable attention to his own affairs, and he is chargeable with knowledge of such facts as such reasonable attention would have afforded him.'
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> "So, also in Foster v. Railroad Co., 146 U. S. 88, 99, 13 Sup. Ct. 28, 32 (36 L. Ed. 899):
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> " 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hence the tendency of courts in recent years has been to hold the plain-

> tiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.' "

In *21 Corpus Juris, 210, Section 211,* it is said:

> "Laches in a general sense is neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done,"

The third headnote in the case of *Washington v. Young,* 224 Ala. 232, is as follows:

> "Without sufficient excuse for further delay, bill to set aside judicial sale for inadequacy of price must be brought within two years."

The fourth headnote in the same case is as follows:

> "In bill to cancel sheriff's deed, actual ignorance of fraud does not excuse laches where complainant is charged by law with constructive notice of facts by recording of conveyance."

In the case of *In re Nichols,* 166 Fed. 603, the third headnote is as follows:

> "Where creditors are informed of the pendency of a creditor's right to preference and made no objection to its allowance for more than eight months after filing of the order of which their attorney had notice, they were barred by laches from obtaining such petition."

In the case of *Foster v. Mansfield C. & L. M. R. Co.*, 146 U. S. 88, 13 Sup. Ct. 28, the second headnote reads as follows:

> "In considering the question of laches by a stockholder in bringing a bill to set aside an alleged fraudulent decree foreclosing a railroad mortgage, it is a strong circumstance against complainant that he does not show that his interest would receive any benefit from the granting of the relief asked, for a court of equity will not do a vain thing, nor will it entertain a bill merely to vindicate an abstract principle of justice, or to compel defendants to buy their peace."

J. F. Stewart had constructive notice of the sale of the lands to Dr. J. P. Dyar when his deed to the lands was filed for record on September 17, 1932.

Section 6854 (1) of the 1928 Code of Alabama, which is an amendment of the original 1923 section by the Legislature, as shown by Acts 1927, page 496, is as follows:

> "WHAT INSTRUMENTS ADMITTED TO RECORD.—All deeds, mortgages, deeds of trust, bills of sale, contracts or other documents purporting to convey any right, title, easement, or interest in any real estate or personal property, and all other securities for debt, when executed in accordance with law, shall be admitted to record in the office of the Probate Judge of any county. Their filing for registration shall constitute notice of their contents,"

To the same effect is the Alabama 1940 Code, Title 47, Section 95.

Section 6860 of the 1923 Code of Alabama is as follows:

> "RECORD OF CONVEYANCE OPERATES AS NOTICE.—The recording in the proper office of any conveyance of property or other instrument which may be legally admitted of record, operates as a notice of the contents of such conveyance, or instrument, without any acknowledgment or probate thereof as required by law."

To the same effect is 1940 Alabama Code, Title 47, Section 102.

In the case of *Ivy v. Hood*, 202 Ala. 121, 79 So. 587, we find the following:

> "Under our registration statute, the record was notice, not only of the fact of foreclosure (Gill v. More, 76 So. 473; Veitch v. Woodward Iron Co., 76 So. 124; Gamble v. Black Warrior Coal Co., 172 Ala. 569, 55 So. 190; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807), but of any inadequacy of consideration on which such sale was made (Drum & Ezekiel v. Bryan, 193 Ala. 395, 397, 69 So. 483.)"

In the case of *Veitch v. Woodward Iron Co.*, 200 Ala. 358 (on page 359) 76 So. 124, we find the following:

> "While the recitals of conveyances are prima facie true as to all parties thereto and privies in estate thereunder, such recitals are not binding on strangers or those who do not hold under any such chain of title. Naugher v. Sparks, 110 Ala. 572, 18 South. 45; Smith v. Steiner, 172 Ala. 79, 55 South. 606; Jackson v. Tribble, 156 Ala. 480, 47 South. 310; Johnson v. Wood, 125 Ala. 330, 28 South. 454; Williamson v. Mayer Bros., 117 Ala. 253, 23 South. 3; Harton v. Little, 176 Ala. 267, 57 South. 851.

"What effect had the recitals in the deed from Mary Veitch to William J. Mims, recorded May 22, 1882, as to giving notice of facts of complainant's equity, such as would put on inquiry parties and privies in estate under said deed?

"In Dixie Grain Co. v. Quinn, 181 Ala. 208, 61 South. 886, Mr. Justice Somerville has collected the authorities; and it is there held that the record presence in the chain of title of a mortgage containing a power of sale charged subsequent purchasers with the duty of inquiry to ascertain whether there had been a foreclosure under the power as to the lands described in the mortgage.

"In Gamble v. Black Warrior Coal Co., 172 Ala. 669, 672, 673, 55 South. 190, Mr. Justice Mayfield said:

> " 'It is also equally well-settled law in this state that whatever is sufficient to put a party on inquiry is enough to charge him with notice. Means of knowledge may be equivalent to knowledge. Whatever is sufficient to put one on his guard and call for inquiry is notice of everything to which the inquiry would lead.
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> '* * * The complainant certainly had knowledge of facts sufficient to elicit inquiry as to the source of appellee's title, and the facts are undisputed that he could and would have ascertained this source had he instituted any inquiry. If the evidence of his and Brotherton's grantors (the patentees) is to be believed, Brotherton had actual notice of the deed from the patentees to Long before and at the time the patentees conveyed to Brotherton, as trustee, in order to cure a defect in the conveyance to Long, and that Brotherton knew, and represented to them that such was the purpose of the conveyance to him.' "

In the case of *Gill v. Moore, et al.*, 200 Ala. 511 (on page 520), 76 South. 453, we find the following:

> "It is unnecessary to multiply authorities to support the rule that the means of knowledge is the equivalent of knowledge (Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Gamble v. Black Warrior Coal Co., 172 Ala. 669, 55 South. 190; Veitch vs. Woodward Iron Co., 76 South. 124) and that this rule has application when the circumstances of the case impose the duty of a reasonable inquiry, and even where it is not required by the express mandate of the statute (Bank v. Baker, 82 Calif. 114, 22 Pac. 1037, 6 L. R. A. 833)."

In the case of *Peters Mineral Land Co. v. Hooper,* 208 Ala. 324, 94 South. 606 (at page 611), we find the following:

> "The statute referred to does not require actual notice, since a fraud discovered within the contemplation of the law when it is readily discoverable or when a party is put upon notice thereof. Ivy v. Hood, 202 Ala. 121, 79 South. 587; Veitch v. Woodward Iron Co., 200 Ala. 358, 76 South. 124; authorities collected in Gill v. More, 200 Ala. 511, 520, 76 South. 453; Gamble v. Black Warrior Coal Co., 172 Ala. 669, 55 South. 190; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807. And it is established that a deed or other conveyance of land in this state becomes effective or constructive notice from the moment of recordation. Chapman v. Johnson, 142 Ala. 633, 38 South. 797, 4 Annot. Cas. 559."

In the case of *Gamble v. Black Warrior Coal Company,* 172 Ala. 669, 55 South. 190, it is said:

> "It has likewise been repeatedly held that, where one is in possession of the premises, the purchaser of

such premises is charged with an implied notice of the nature of his title. Daniels v. Sorrells, 9 Ala. 440.

"It is also well-settled law in this state that whatever is sufficient to put a party on inquiry is enough to charge him with notice. Means of knowledge may be equivalent to knowledge. Whatever is sufficient to put one on his guard, and call for inquiry, is notice of everything to which the inquiry would lead. Cole v. Birmingham Un. Ru. Co., 143 Ala. 427, 39 South. 403; Pepper v. George, 51 Ala. 194.)"

The District Court having made findings of fact which were erroneous, and shown to be so by the evidence and by the law, it was the duty of the Circuit Court of Appeals to reverse the decree of the District Court, regardless of the fact that the District Court had witnesses in person and heard all their testimony.

We respectfully insist that the opinion of the Circuit Court of Appeals was properly rendered, and that the same should not be disturbed by this proceeding.

Respectfully submitted,

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